No. 906

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

AMERICAN FLINT GLASS WORKERS' UNION OF NORTH AMERICA, AFL-CIO, *ET AL.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH A. ROBIE
EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Petitioners

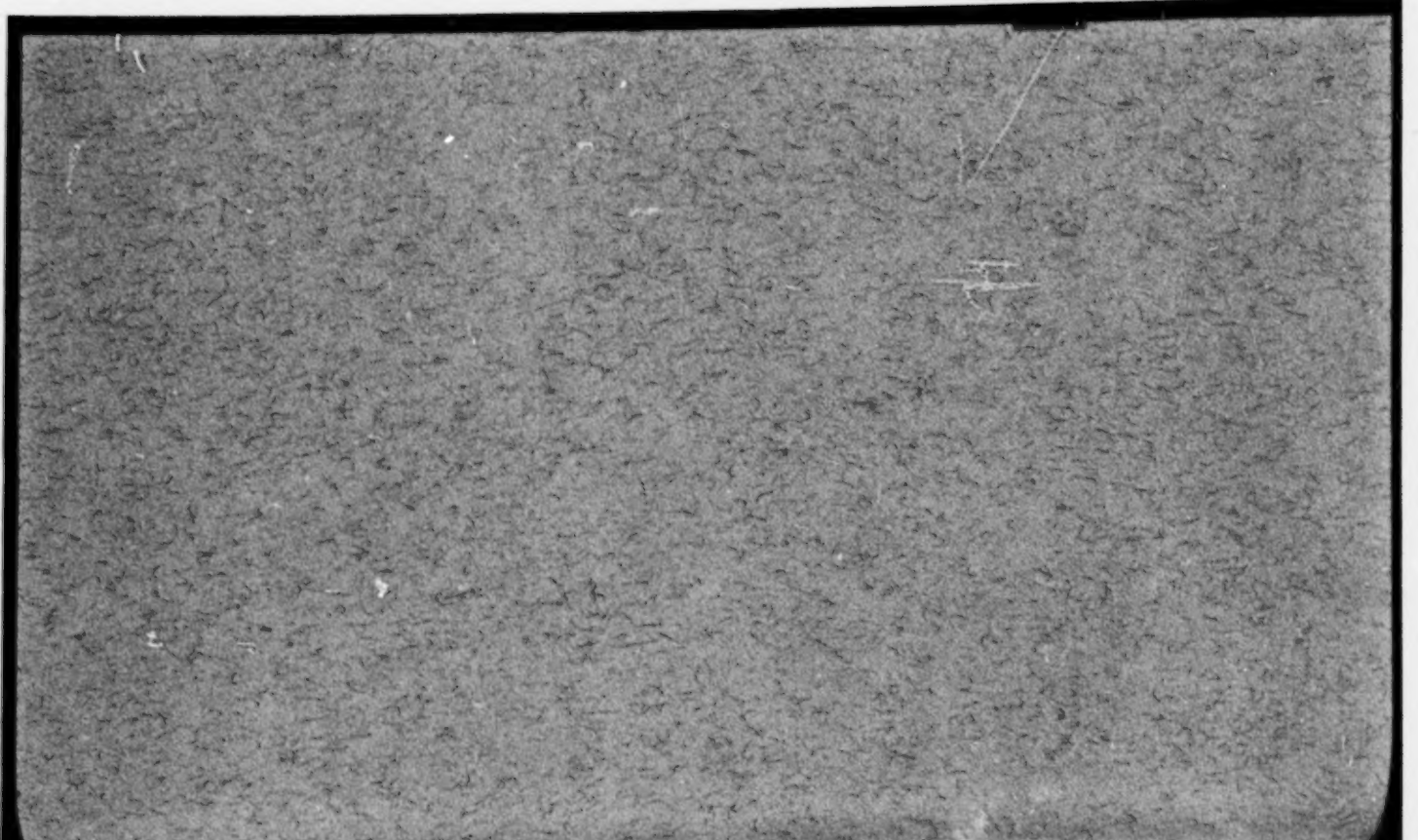
Of Counsel:

MULHOLLAND, ROBIE & HICKEY
741 National Bank Building
Toledo 4, Ohio

620 Tower Building
Washington 5, D. C.

April 27, 1956

Press of Byron S. Adams, Washington, D. C.



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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on January 30, 1956.

OPINIONS BELOW.

The opinion and order of the National Labor Relations Board is reported at 110 NLRB 395. (Appendix

B, 8a-13a) The opinion of the Court of Appeals (R. 427-441) is unreported and is printed in Appendix C, *infra*, 14a-27a.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 30, 1956 (R. 442); Appendix C hereto, *infra*, 28a. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED.

Where the facts of record as found by a trial examiner of the National Labor Relations Board established a *prima facie* case of unlawful discrimination against employees in not rehiring them following an unsuccessful economic strike and the examiner rejected the testimony of the employer's witness offering an explanation of the failure to rehire, may the Board, thereafter, within the rule of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, and *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, validly reverse the examiner's report without finding the testimony of the employer's witness to be credible and accepting his explanation and without setting aside the basic findings of fact upon which the examiner relied?

STATUTES INVOLVED.

The statutory provisions involved are sections 7, 8 (a)(1), 8 (a)(3) and 10 (a) through 10 (f) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 and are found in Title I, Section 101, 61 Stat. 140, 143, 147, 29 U.S.C.A. 157, 158 (a)(1) and (a)(3), 160. These provisions are printed in Appendix A, *infra*, 1a-7a.

STATEMENT.

This litigation arose out of an economic strike called by the petitioner American Flint Glass Workers' Union of North America (hereinafter called the "Union") at the Sapulpa, Oklahoma, plant of the Bartlett-Collins Company (hereinafter called the "Company"), a manufacturer of glass products. (R. 412) The strike was called by the Union in an effort to obtain what it regarded as better provisions in a collective bargaining contract on behalf of the Company's production and maintenance workers whom it represented. (R. 23, 322)

The strike lasted from March 14 to March 29, 1951, and was unsuccessful. (R. 412) 150 employees originally participated in the strike (R. 32) and during its course 30 returned to work (R. 32). The Company hired approximately 145 new employees during the period of the strike. (R. 269-271)

The strike was ended by the Union after a conference with the management of the Company upon the representations of the Company's vice-president that it had nothing against the strikers and would reemploy them as soon as the Company could. (R. 30, 31, 156-158) This information was given to the strikers who were advised to apply for reemployment with the Company's personnel director. (R. 159-160) The strikers did so, including the twenty-five individuals who are petitioners in the present case. (R. 52, 78, 89, 97, 99, 104, 108, 110, 114, 119, 121, 125, 126, 129, 131, 132, 134, 138, 140, 142, 145, 149, 152, 251, 266) The personnel director of the Company advised each of these individuals that they need not make out a formal application for work, that as soon as an available job opened he would call them, and that their names were placed on a list of

available workers. (R. 68, 78, 88, 89, 97, 99, 104, 109, 111, 115, 251)

The Company did reemploy 73 ex-strikers (R. 413), but not the 25 individual petitioners, in spite of the fact that from the end of the strike through April, 1953, it hired 510 new employees in departments of its operation in which such petitioners were employed prior to the strike. (R. 264-294, 296)[1] All of these petitioners were on picket duty on the last day of the strike or the evening of the previous day, (R. 89, 97, 99, 103, 108, 119, 120, 124, 126, 129, 130-132, 137, 140, 142, 145, 149, 152, 251) and five of them were either Union officers or members of the nine man Union negotiating committee during the strike. (R. 36) Only one Union official and Committeeman who applied for employment after the strike was rehired. That one was personally solicited by the personnel director of the Company who travelled 20 miles to her home to ask her to return after the Company had been put on notice that an unfair labor practice charge would be filed against the Company. (R.

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[1] The breakdown of the new employees with respect to departments of the Company was as follows:

Selecting and Packing	210
Decorating	162
Automatic Forming Machines	28
Machine Shop and Mold Cleaning	4
Warehouse and Shipping	93
Maintenance	13

The 25 individual petitioners were employed, prior to the strike in the following departments:

Selecting and Packing	16
Decorating	4
Automatic Forming Machines	1
Machine Shop and Mold Cleaning	1

168, 251, 252) The personnel director subsequently advised the individual that she had never caused any trouble and he was glad to have her back, but would not walk across the street for some of them. (R. 254)

The Union filed an unfair labor practice charge against the Company with the National Labor Relations Board (hereinafter called "the Board") on September 5, 1951 (R. 3-6), which was subsequently amended. (R. 6-8) After investigation of the charge, the General Counsel of the Board issued a complaint against the Company (R. 10-14), later amended (R. 17, 18) and a hearing was held thereon. (R. 9) The trial examiner made the following findings of fact on the evidence before him:

1. There was an agreement by the Company with the union at the end of the strike that "it would take back any strikers who wished to return to work, if and when work became available for which they were qualified." (R. 336)
2. There were promises by the Company's personnel director Coley, both express and implied, to individual strikers that they would be called back to work when jobs became open for them and that it was unnecessary that their applications be renewed. (R. 336) Coley failed to disclose to these individuals his intention not to keep their applications current after a given period. (R. 336)
3. There were numerous vacancies which occurred in the Company after the strike for which the petitioners were qualified and which were filled instead by newly hired employees. (R. 337)
4. Such preference was given to newly hired employees in spite of the fact that both the vice president of the Company, Bartlett, and its personnel director, Coley, acknowledged that the

prior training and experience of the petitioners made them valuable employees, whose qualifications would ordinarily entitle them to preference over new, inexperienced applicants. This was the reason expressly given by Bartlett to the Union at the ending of the strike for the Company's willingness to take back the strikers. (R. 337)

5. No evidence was present of a specific valid reason why the Company filled its vacancies with untried outsiders rather than with the experienced petitioners. (R. 337)

6. The Company ceased to reemploy strikers in any substantial numbers around April 19, 1951, or about the time that it ceased to recognize the Union as the bargaining agent for its employees. (R. 337)

7. The Company failed to reemploy a single Union committeeman except for one who applied prior to the end of the strike. (R. 336) It belatedly reemployed a single Union officer after the Union pointed out to the Company that its discrimination against Union members was especially noticeable by its failure to reemploy Union officers and Committeemen and after an unfair labor practice charge had been filed. Moreover, this one Union officer was rehired after special efforts by personnel director Coley, *supra*, p. 4, which strongly suggested that the individual involved was a favorite of Coley and had been selected for that reason. (R. 337)

8. A large majority of the petitioners were active picket participants up to the last day of the strike. (R. 337)

The trial examiner concluded that these facts plainly made out a *prima facie* case that the Company was

discriminatorily motivated in failing to reemploy petitioners unless overborne by countervailing evidence. (R. 337, 338)

The only explanation offered by the Company for its failure to rehire the individual petitioners was that no jobs were open during the period when their applications for reemployment were current. (R. 336, 338, 431, 435) It was the testimony of the Company's personnel director Coley that he followed a policy of treating applications for reemployment as current only for a limited period, and that this policy was applied to the individual petitioners without discrimination. (R. 431) The trial examiner rejected this explanation of the Company's action finding as a fact that Coley had not only failed to inform the individual petitioners that he would consider their applications as current for only a brief temporary period but had made representations to them directly to the contrary. (R. 340) This rejection of Coley's testimony necessarily involved the appraisal by the trial examiner of the demeanor and credibility of the witness.

The examiner also concluded that the absence of any record of prior unfair labor practices by the Company was not determinative because such circumstance is universal to all cases of first offenders and the issue before the Board was whether the Company was in fact a first offender. (R. 338). Finally, the examiner concluded that it was immaterial that the Company had not discriminated against all strikers, particularly when the list of those who were denied employment consisted predominantly of Union officers and committeemen and members who had actively engaged in picketing up to the closing hours of the strike. (R. 338)

The examiner therefore made an ultimate determination that, upon the basis of the preponderance of the evidence in record as a whole, the General Counsel of the Board had established that the Company had engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3) of the Labor Management Relations Act. (29 U.S.C.A. 158 (a)(1)(3)) He recommended that the individual petitioners be given immediate and full reinstatement by the Company to their former or substantially equivalent positions, and with two exceptions, be made whole for any loss of pay suffered by them as a result of the Company's discrimination against them. (R. 345)

The Company excepted to the trial examiner's report. (R. 356-410.) Thereafter the Board reversed the trial examiner's conclusion that the Company had refused to reemploy the individual petitioners for discriminatory reasons. (R. 415, Appendix B, 12a) In so doing, the Board did not set aside a single one of the examiner's findings of fact; it did not set aside the examiner's rejection of the Company's explanation of its refusal to reemploy the individual petitioners embodied in the testimony of personned director Coley; and it did not even reject the examiner's conclusion that the facts which he found added up to a *prima facie* case of discrimination. (R. 411-415, Appendix B, 8a-12a)

All that the Board did in support of its reversal of the trial examiner was: (1) to find (a) that the fact the Company had rehired only two of the ten Union officers or committeemen was not "sufficient" to support a conclusion of discriminatory motivation (R. 413-414, Appendix B, 10a, 11a), while at the same time conceding that this was only one of many facts on which

the examiner relied for his conclusion (R. 413, Appendix B, 10a); (b) that the failure of the Company to comply with its undertaking to rehire the strikers as soon as it could was not discriminatory as a matter of law if the examiner meant to so imply (R. 414, 415, Appendix B, 11a, 12a); and

(2) to "note" that (a) the Company had a background free of unfair labor practices, and (b) that the majority of strikers applying for reemployment were rehired and were not discriminated against upon return to work. (R. 415, Appendix B, 12a)

Petitioners filed a petition with the Court of Appeals to review this order of the Board and modify it upon the ground that the agency's conclusions were not supported by substantial evidence in the record considered as a whole and were in fact contrary to the evidence of such record. (R. 417-419.) In its opinion of January 30, 1956, a majority of the Court of Appeals confirmed the Board's order (R. 427-434, Appendix C, 14a-20a) The Court concluded that the facts were "substantially undisputed" and that the Board's reversal of its trial examiner was proper and justified by the evidence. (R. 432-434, Appendix C, 20a) This conclusion was predicated on the erroneous assumption that the Board had accepted personnel director Coley's explanation for the refusal to rehire the individual petitioners. On this point the majority opinion declared (R. 432, Appendix C, 18a):

> "The uncontradicted testimony of the personnel manager was obviously believed by the Board and we cannot say that it was not justified in so doing."

Circuit Judge Bazelon dissented. (R. 435-441, Appendix C, 21a-27a) He reviewed the trial examiner's findings of fact on each basic issue affecting dis-

crimination and concluded that the Board had not disturbed the finding (1) that jobs were available; (2) that individual petitioners had applied for such jobs; and (3) that their "applications were understood to be continuing ones" and not *"for only a short and indefinite period."* (R. 441, Appendix C, 27a) He therefore further concluded that "the sole reason which the Company offered for not employing these strikers is plainly refuted by the record." (R. 441, Appendix C, 27a) The dissent then expressed the view that the reasons relied upon by the Board to find an absence of discrimination were "frivolous" and under this Court's decisions insufficient to support the agency's action. (R. 441, Appendix C, 27a)

REASONS FOR GRANTING WRIT.

The present petition raises issues with respect to the application of this Court's decisions in *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955) and *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951) which are important to the proper functioning of the administrative process.

In this case the Company was charged with discrimination in failing to rehire the twenty-five individual petitioners following an economic strike. After hearing on this charge, the trial examiner of the Board found that the circumstances surrounding the Company's failure to rehire the individual petitioners plainly made out a *prima facie* case and required a finding that the company was discriminatorily motivated unless overborne by countervailing evidence offered by the Company. (R. 336-338.) The Company's countervailing evidence was embodied in the testimony of its personnel director, Albert B. Coley. (R. 39-46, 195-

207.) This witness offered the explanation that it was his usual policy to keep applications for employment current for not more than thirty days and that the applications of the individual petitioners were handled in this manner. As a result, the witness claimed that no jobs were available for the individual petitioners during the period of the currency of their applications. (R. 204.) The trial examiner considered this testimony and rejected it. (R. 338-340, 341.) His report included a finding that there was not present a specific valid reason for the Company hiring outside applicants in preference to the experienced individual petitioners when vacancies occurred following the strike. (R. 337.) Upon this state of facts the trial examiner concluded that the Company had discriminated against the individual petitioners in violation of the Labor Managements Relations Act. (R. 341.)

There is no dispute in this record as to the facts which the examiner found. Neither the Board nor the majority of the Court below disagreed with these findings. Indeed, the majority opinion of the Court of Appeals states that the facts were "substantially undisputed." (R. 434, Appendix C, 20a) Likewise, there is no basis for any contention that these facts did not, as the examiner found, spell out a *prima facie* case of discrimination by the Company. Again, neither the Board[1] nor the majority below found to the contrary, and it would plainly have been error to do so.

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[1] The Board's opinion stated that it did not believe the fact that only two of ten Union officers and committeemen were rehired by the Company was sufficient to support a finding of discrimination while at the same time recognizing that this was only one of the facts, *inter alia*, upon which the examiner relied to support his finding of a *prima facie* case of discrimination. (R. 413, 414, Appendix B, 10a, 11a)

Thus, the Board was confronted with a situation in which, in order to exonerate the Company, it was required to dispute the trial examiner's judgment with respect to the credibility of the Company's principal witness and to accept Coley's explanation for his and the Company's action. Yet, the Board was unwilling to make such a finding and in fact did not do so. (R. 411-415, Appendix B, 8a-12a) In the absence of such a finding, the facts as established by the trial examiner's uncontroverted findings lead only to one conclusion, i.e., unlawful discrimination against the individual petitioners by the Company. Consequently, under the rule of the *Universal Camera* case, *supra*, as reaffirmed by the *Allentown Broadcasting* case, *supra*, making the examiner's report a part of the record, the Board's action is plainly unsupported by the required substantial evidence.

The majority of the Court below did not hold that the Board was not required to accept Coley's testimony, but rather based its affirmance of the Board order in principal part upon the assumption that "the uncontradicted testimony of the personnel manager was obviously believed by the Board." (R. 432, Appendix C, 18a) This assumption was wholly unwarranted.

The Board's opinion does not contain a single word dealing with personnel manager Coley's testimony and the examiner's rejection thereof. (R. 411-415, Appendix B, 8a-12a) The majority below did not cite any Board findings on this core of the case, but rather fell back on the general conclusion that the Board must have believed it. However, the fact that such a belief by the Board was clearly required to support the agency's conclusion as to nondiscrimination does not establish its existence, particularly where it would

have been a simple matter for the Board to state this belief and it avoided doing so. The dissenting opinion was correct in concluding that "the sole reason which the Company offered for not employing these strikers is plainly refuted by the record." (R. 441, Appendix C, 27a)

Petitioners submit that the majority below committed reversible legal error in ascribing to the record in support of the Board's order facts which the trial examiner had rejected and with respect to which the agency made no findings. If it did not, then we believe that the decisions in the *Universal Camera* case, *supra,* and the *Allentown Broadcasting* case, *supra,* making an examiner's report a part of the record to be considered as a whole, have little significance and the use of intermediate reports becomes a burden to parties before administrative agencies rather than a protection of their rights. These parties are then subject to whatever results the whims of the agency majority of the moment may dictate.

The dissenting opinion below correctly summarized the Board's order when it concluded (R. 441, Appendix C, 27a):

> "In light of the record as a whole, including the Trial Examiner's findings, it seems to me that the matters relied upon by the Board may fairly be said to be frivolous. It is at least clear that, under any reasonable view of the Supreme Court's decisions in *Federal Communications Comm'n* v. *Allentown Broadcasting Corp.*, 349 U.S. 35 (1955); and *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), such matters are plainly insufficient to support the Board's action."

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

JOSEPH A. ROBIE
EDWARD J. HICKEY, JR.
JAMES L. HIGHSHAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Petitioners

Of Counsel:
MULHOLLAND, ROBIE & HICKEY
741 National Bank Building
Toledo 4, Ohio

620 Tower Building
Washington 5, D. C.

Dated: April 27, 1956.

APPENDIX

APPENDIX

APPENDIX A

Section 7 of Labor Management Relations Act of 1947

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I. § 101, 61 Stat. 140.

Sections 8(a)(1) and 8(a)(3) of Labor Management Relations Act of 1947

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection, as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective- bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding

twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Sections 10(a) through 10(f) of Labor Management Relations Act of 1947

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency, jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence inapplicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such a person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In

case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Modification of findings or orders prior to filing record in court.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to court for enforcement of order; proceedings; review of judgment.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court

shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final orders of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-CA-421

BARTLETT-COLLINS COMPANY

and

AMERICAN FLINT GLASS WORKERS' UNION OF NORTH AMERICA, AFL

DECISION AND ORDER

On September 8, 1953, Trial Examiner George A. Downing, issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent Company requested oral argument and filed exceptions to the Intermediate Report. The Respondent's request for oral argument is hereby denied as the record adequately presents the issues and the positions of the parties.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and the entire record in the case and finds merit in the Respondent's exceptions.

1. The Trial Examiner found that the Respondent, by failing to reemploy the 25 persons whose names are listed in Appendix A of the Intermediate Report attached hereto, violated Section 8 (a) (3) and (1) of the Act. We disagree. Upon careful analysis of the entire record, we find that the preponderance of the evidence fails to support the above findings of the Trial Examiner.

This case involves a situation growing out of a 15-day economic strike at the Respondent's plant, which began March 14, 1951. Of some 460 employees in the production and maintenance unit, about 170, predominately union members, participated in the strike. These were joined by 11 moldmakers whom the Union separately represented as a craft group. Except for those strikers who returned during the strike and the moldmakers, all strikers had been permanently replaced by the end of the strike on March 29, 1951.

Picketing ceased about 11 a.m. on March 29, and a conference between the Respondent and the Union took place at 2 p.m. that day. With respect to the moldmakers the Respondent stated "that naturally they would return to work under the same conditions" as before the strike. The Union then asked whether the Respondent would take back the other strikers as soon as it could. The Respondent replied: "Naturally we are going to put on these people when we can. We'll do the best we can." The Union then announced that the strike was officially over and advised the strikers to make immediate application for employment.

Following the termination of the picketing on March 29, about 100 strikers applied for employment, all but a few applying within a 2½ week period. At the time of application, the Respondent did not require the strikers to file new written applications because it had their original ones. Rather, it placed their names on a separate list, and informed them that it would call them in the event of an opening.[1]

Not counting the moldmakers who were all reinstated,

[1] The Trial Examiner found that the strikers' applications were continuing in nature despite the Respondent's practice to consider them only for a short period. However, whether or not the applications be considered as continuing, our ultimate decision that the General Counsel has not established discriminatory motivation on the part of the Respondent by preponderance of the evidence remains unaffected.

out of a total of approximately 170 strikers in the production and maintenance unit, a total of 103 returned to work. Of the latter, 30 returned during the strike and 73 after the strike.[2] Of those strikers who did not return to work, 38 either did not apply and/or abandoned any claim to reemployment. The rest include those named in the complaint. The Trial Examiner found that 25 of the complainants had been discriminatorily refused reemployment.[3]

As supporting a finding of discriminatory motivation, the Trial Examiner relies, *inter alia*, on the fact that only two of the 10 union officers and committeemen were reemployed and that a large majority of those named in the complaint walked the picket line during the last 2 days of the strike.

However, the record shows that only 4 of the 10 union officers and committeemen were named in the complaint.[4] And of these 4, 3 (Broyles, Sloan[5] and Asher) either specifically asked for their old jobs back, which were filled at the time, or unlike the great majority of the strikers, did not apply until 5 or more weeks after the strike. Moreover, although many of the complainants walked the picket line during the last 2 days of the strike, so too did, the evidence indicates, a substantial number of the strikers whom

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[2] About 60 of these 73 strikers were reemployed during the first 3 weeks after the strike. In this respect the record shows that the Respondent, during April 1951, was overstaffed in the unit with an average employment of 511 as compared to 461 before the strike.

[3] The Trial Examiner found that, as to five of the strikers named in the complaint, four made no application and one abandoned any claim to reemployment. No exceptions having been filed to these findings, they hereby are adopted without further comment.

[4] With respect to the 6 remaining union officials, 1 did not go on strike, 2 returned to work, and, as found by the Trial Examiner, the remaining 3 abandoned any claim to reemployment.

[5] Although Sloan is listed on General Counsel's Exhibit 5 as applying on April 2, 1951, he testified that he did not apply until about 5 weeks after the termination of the strike, and we so find.

the Employer reemployed.[6] Contrary to the Trial Examiner, we do not believe that the afore-mentioned factors are sufficient to support a finding of discriminatory motivation on the part of the Respondent.[7]

The Trial Examiner found that the Respondent's statement to the Union at the March 29 conference to the effect that the Respondent would take the strikers back when it could constitute an agreement to rehire which conferred upon the permanently replaced economic strikers a "preferential status in future hirings" over new employees and "waived whatever rights it (Respondent) had to consider the strikers only as new employees." Even assuming that Respondent's remarks constituted an agreement to rehire, we disagree with the Trial Examiner to the extent that he implies that the failure to comply with this agreement was, in effect, discriminatory as a matter of law. Permanently replaced economic strikers merely have the right not to be penalized for their concerted activity, and are not entitled to preferential status in hiring. They are in the position of applicants for new employment as to whom the General Counsel must sustain his burden of proving discriminatory motivation on the part of the Respondent. Nor do the cases cited by the Trial Examiner show otherwise.[8]

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[6] Thus, there is testimony indicating that somewhere between 50 and 90 strikers walked the picket line each day on a rotational basis. Although there is also testimony that the number of strikers dwindled during the course of the strike, no figures are given.

[7] The Trial Examiner finds it significant that the Respondent ceased to reemploy strikers in any substantial number around April 19, 1951, corresponding with its refusal to negotiate with the Union as representative of its employees. Unlike the Trial Examiner, we find no significance in this, because the Respondent had long before questioned the union's majority on March 28, prior to the end of the strike. In any event, all hiring by the Respondent was substantially curtailed between April 19, when the Respondent was overstaffed, and August 1, 1951.

[8] *Roure-Dupont Mfg. Co., Inc.*, 199 F. 2d 631 (C.A. 2), enf'g as mod. 93 NLRB 1240, *Wilson and Company*, 124 F. 2d 845 (C.A. 7), enf'g 30 NLRB 314; *Union Bus Terminal of Dallas, Inc.*, 98 NLRB 458, enf. den. 211 F. 2d 825 (C.A. 5), on other grounds.

In all those cases, discriminatory motivation was either independently evidenced by other conduct or admitted. In the instant case, however, we do not believe that the evidence is sufficient to support a finding of discriminatory motivation on the part of the Respondent. We note that the Respondent has a background free of unfair labor practices, that the great majority of the strikers who applied for reemployment were rehired, and that there is no showing that any of the rehired strikers, who were also union members and had participated in picketing, was discriminatorily treated upon return to work.

Under all the circumstances and upon the entire record, we find that the General Counsel has failed to sustain his burden of proving discriminatory motivation by a preponderance of the evidence.

Accordingly, as the evidence fails to establish that the complainants listed in Appendix A of the Intermediate Report attached hereto, were refused employment for discriminatory reasons, we shall dismiss the complaint as to them.

Vernon Harris

We do not agree with the Trial Examiner that by failing to promote former striker Harris to superior positions as they arose, the Respondent violated Section 8 (a) (3) and (1) of the Act. The Trial Examiner found that the Respondent's agreement to take back the strikers precluded its defense that Harris was rehired as a new employee in accord with a company rule. As hereinabove set forth, Harris, like the other strikers, was an applicant for new employment and was not entitled to any preferential status. Therefore, in the absence of sufficient evidence on the record as a whole to show that the Respondent was discriminatorily motivated, we shall dismiss the complaint as to Harris.

Accordingly, as we have found that the Respondent has not engaged in any of the unfair labor practices alleged in the complaint, we shall dismiss the complaint in its entirety.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondent Bartlett-Collins Company, be, and it hereby is dismissed.

Dated, Washington, D. C., October 19, 1954.

IVAR H. PETERSON, *Member*
PHILIP RAY RODGERS, *Member*
ALBERT C. BEESON, *Member*
National Labor Relations Board

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,620

AMERICAN FLINT GLASS WORKERS' UNION OF NORTH AMERICA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
BARTLETT-COLLINS COMPANY, INTERVENOR

On Petition to Review Order of the
National Labor Relations Board

Decided January 30, 1956

Mr. Donald W. Fisher, of the bar of the Supreme Court of Ohio, *pro hac vice,* by special leave of court, with whom *Messrs. Edward J. Hickey, Jr.,* and *James L. Highsaw, Jr.,* were on the brief, for petitioner. *Mr. Clarence M. Mulholland* also entered an appearance for petitioner.

Miss Fannie M. Boyls, of the bar of the Supreme Court of Texas, *pro hac vice,* by special leave of court, with whom *Mr. Marcel Mallet-Prevost,* Assistant General Counsel, and *Mrs. Nancy M. Sherman,* Attorney, were on the brief, for respondent. *Mr. Robert G. Johnson,* Attorney, also entered an appearance for respondent.

Mr. Karl H. Mueller, with whom *Mr. Jesse R. Smith* was on the brief, for intervenor.

Before BAZELON, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge*: This case is before the court on petition for review or to modify an order of the Na-

tional Labor Relations Board. The petitioners are American Flint Glass Workers' Union of North America (A. F. of L.) and twenty-five individuals, members of that union, formerly employed by the intervenor, Bartlett-Collins Company, of Sapulpa, Oklahoma.

The proceedings before the Board began with a complaint filed with the Board by its General Counsel, alleging that the company had engaged in unfair labor practices proscribed by § 8(a)(1) and (3) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 159(a)(1) and (3), by discriminatorily refusing to reinstate or reemploy the present petitioners, among others, following a strike.

The Board's Hearing Examiner found that the company had engaged in unfair labor practices, and recommended a cease and desist order, reinstatement of the petitioners in their former or substantially equivalent jobs, and back pay for all but two of the petitioners. The Board, in its order of October 19, 1954, the order appealed from, reversed the examiner's findings and found that, upon the whole record, the General Counsel had failed to establish, by a preponderance of the evidence, unfair labor practices as charged.

The issue presented by the petitioners for review is whether or not the Board's finding that the General Counsel had failed to sustain the burden of proof that the individual petitioners were refused reemployment for discriminatory reasons, in violation of § 8(a)(1) and (3), is supported by the record considered as a whole.

We agree with the Board.

Prior to the strike hereinafter referred to, the company had recognized and bargained with the union for a number of years. Since 1915 it had dealt with the union regarding a unit of moldmakers and other skilled employees. Following an election in 1941 the company bargained with the union regarding a unit of miscellaneous production and maintenance employees. During negotiations for the contract in 1941 a strike was called, which resulted in a contract, following which the company reinstated all the strikers, including some of the individual petitioners in the

instant proceeding. From 1941 to 1951 the company and the union maintained continuous contractual relations, including a check-off. No unfair labor practices are alleged or have been proved to have occurred during that period.

In January 1951 the union formally notified the company that as of March 7, 1951, it would terminate the current contract and that, unless a new contract was agreed upon, a strike would be called. Negotiations were not concluded and, on March 14, 1951, an economic strike was called. One hundred and seventy of approximately 460 employees in the production and maintenance unit participated, along with 11 moldmakers. By the end of the strike on March 29, 1951, all strikers had been replaced except those strikers who returned during the strike and the 11 moldmakers.

The picketing, which had been entirely peaceful, ceased on the morning of March 29 and a conference was had between representatives of the union and of the company at 2:00 P.M. of that day. The company's representative stated that the moldmakers, who were especially skilled workers, could return to work under the same conditions as prior to the strike, and this was done. In answer to a question as to whether or not the respondent would take back other strikers as soon as it could, the representative of the company stated that the company would put on these people when it could, that the company would do the best it could[1] The union representative then advised the replaced strikers to make applications for reemployment. Many, in fact, had already done so upon removal of the picket line that morning.

About 100 strikers thereupon applied for reemployment, all but a few within a two and a half-week period. New applications for employment were not required as the old applications were on file, but the company placed their

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[1] Certainly the employer was not bound to discharge those hired to fill the places of the strikers. *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 345-46 (1938).

names on a separate list and informed them that they would be called in the event of an opening.

The examiner and the Board found that of the 170 strikers in the production and maintenance unit[2] 30 returned during the strike and 73 after the strike, this despite the fact that the company had restaffed its plant with new employees and the strikers who had returned during the strike. Thirty-eight of the remainder did not apply and asserted no claim to reemployment.

The rest included those named in the complaint and, of these, the trial examiner found that 25 had been discriminatorily refused reemployment. As evidence, the trial examiner reported that only two of the union officers and committeemen were reemployed and that a large majority of those named in the complaint, and who were not reemployed, had walked the picket line in the last two days of the strike.

As the Board points out, however, only four of the ten union officers and committeemen are named in the complaint. One of the remaining six did not go out on strike, two returned to work during the strike, and the remaining three asserted no claim to reemployment. Of the four referred to by the examiner, three either specifically asked for their old jobs back (which had been filled at the time) or did not apply until five or more weeks after the strike.

Although many of the complainants walked the picket line during the last two days of the strike, this was true also of a substantial number of strikers whom the company later reemployed.

The Board further found that the evidence was insufficient to support a finding of discriminatory motivation on the part of the respondent. It found that the respondent had a background free of unfair labor practices, that the great majority of the strikers who applied for reemployment were rehired, and that there had been no showing that

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[2] The 11 moldmakers were immediately reemployed.

any of the strikers who were also union members and had participated in picketing were discriminatorily treated after their return to work.

The company's position with reference to the claim that it failed to rehire certain of the strikers was that there were no positions available when the requests for employment were in an active status. It appears that the personnel manager of the company was personally and solely in charge of the hiring of personnel. It was the testimony of the personnel manager, and this is uncontradicted, that when employees were needed by the company they were needed at once and that, if any applicants were physically present in the personnel office when the need arose, they were usually hired on the spot. It was further testified that, due to the labor situation in Sapulpa, applicants for employment were generally not available for work after a week or two, as they had by that time ordinarily accepted other employment. It was also the testimony of the personnel manager that he had found it to be a waste of time to attempt to get in touch with applicants even a week after the applications were filed and that he ordinarily made no attempt to get in touch with any applicant for employment more than four weeks from the time the application was filed. He further testified that he did not handle the petitioners' applications any differently from those of new applicants.

It is of interest too that immediately after the strike the company was overstaffed, with an average employment of 511 compared to 461 before the strike. The uncontradicted testimony of the personnel manager was obviously believed by the Board and we cannot say that it was not justified in so doing.

The Board concluded that under all the circumstances, and upon the record as a whole, the General Counsel had failed, by a preponderance of the evidence, to sustain his burden of proof of discriminatory motivation.

Stress is laid by the petitioners upon the fact that the examiner's findings were reversed.[2]

The matter of the overruling of a trial examiner's findings by a Board was before the Supreme Court in *F. C. C. v. Allentown Broadcasting Co.*, 349 U. S. 358, 363-64 (1955), a case arising in this circuit. There the court said:

> "In reaching its conclusion to set aside the Commission's order awarding the license to Easton, the Court of Appeals found that the Commission's reversal of its Hearing Examiner was erroneous. That court analyzed the evidence before the Commission as to Easton's uncertainty on affiliating with radio networks to secure their program for its listeners, the reluctance, evasiveness and lack of candor of Easton's principal witnesses and the concentration of local communications media in the hands of the Easton applicant who was the publisher of the only local newspaper, the license of one of two FM radio stations and of the only television station. The court agreed with the Examiner and overruled the Commission. None of the above circumstances are in themselves a bar to the Commission's grant of license. Each involves appraisals of testimony that put into a record facts derived from various witnesses by interrogation. There was substantial evidence considering the whole record that had to be weighed, pro and con, as to types of programs ,evasivenss of witnesses, and the desirability of allocating an additional license to an applicant who already controlled other means of communication.
>
> "The Court of Appeals' conclusion of error as to

[2] The petitioners claim: "The Board reversed the Trial Examiner's Intermediate Report in which, on the basis of the above facts, he found the Company guilty of illegal discrimination, but, yet, it failed to credit the Company with any valid reason for the non-employment of Petitioners. It, moreover, did not disagree with any of the major findings of fact by the Trial Examiner, and failed to make any additional findings of fact." (Petitioners' brief, pp. 15-16.)

evasiveness relies largely on its understanding that the Examiner's findings based on demeanor of a witness are not to be overruled by a Board without a 'very substantial preponderance in the testimony as recorded,' citing *Labor Board* v. *Universal Camera Corp.*, 190 F. 2d 429, 430. We think this attitude goes too far. It seems to adopt for examiners of administrative agencies the 'clearly erroneous' rule of the Fed. Rules Civ. Proc., 52 (a), applicable to courts. In *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 492, we said, as to the Labor Management Relations Act hearings:

> 'Section 10 (c) of the Labor Management Relations Act provides that "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact . . . ." 61 Stat. 147, 29 U.S.C. (Supp. III) § 160 (c). The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required."

That comment is here applicable. See also § 8 of the Administrative Procedure Act, 60 Stat. 242."

In the instant case the facts were substantially undisputed and we believe that the Board's conclusion, that the General Counsel had not sustained his burden of proof by a preponderance of the evidence that the company was discriminatorily motivated, was proper and justified by the evidence. When we so determine, our limited function is exhausted.

It follows that the order on review should be and is

Affirmed.

BAZELON, *Circuit Judge,* dissenting: The issue in this case was sharply drawn at the hearing before the Trial Examiner. The general counsel of the Board asserted that the Company's refusal to re-employ the strikers involved here was discriminatory because it was based upon their active Union membership and "last ditch" participation in the strike. The Company's position was that it refused re-employment, not for such discriminatory reasons, but solely because no jobs were open when applications of these strikers were filed or were current.

I. But as to the availability of such jobs, the Trial Examiner found:[1]

> 1. From the end of the strike on March 29, 1951 through April 1953, the following numbers of employees were hired in the departments in which our petitioners had been employed:
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> | | |
> |---|---|
> | Selecting and Packing | 210 |
> | Decorating | 162 |
> | Automatic forming machines | 28 |
> | Machine Shop & Mold Cleaning | 4 |
>
> Our petitioners had been employed in these departments as follows:[2]
>
> | | |
> |---|---|
> | Selecting and Packing | 16 |
> | Decorating | 4 |
> | Automatic forming machines | 4 |
> | Machine Shop & Mold Cleaning | 1 |
>
> 2. The exhibits do not disclose exactly "when job openings occurred which should have been offered to the former employees. It is clear, however, that in

[1] The findings of fact referred to and quoted hereafter are contained in the Trial Examiner's Intermediate Report and Recommended Order, Sept. 1953.

[2] The Trial Examiner's finding on this point related to 30 individuals who filed the original complaint. The figures cited here apply that breakdown to the 25 who are appellants.

most cases there were vacancies within a short time of the applications, because Respondent continued its hiring of new employees following the end of the strike and had employed a total of 158 by the end of the year."

II. As to the applications for such jobs, the Trial Examiner found:

1. Shortly before the strike began, ". . . Respondent issued a form letter to all employees, informing them that in event of a strike it proposed to operate the plant, that it intended to fill the jobs of employees who struck, and that after the strike it would take back any strikers who wished to return, if and when work was available for which they were qualified, provided they had not engaged in any improper or unlawful conduct in the meantime. Negotiations having proved unsuccessful, the Union called a strike on March 14, which was continued until March 29. There is no claim of any prior unfair labor practices, the General Counsel conceding that the strike was an economic one."

2. At a conference on March 29, between Union and Company representatives, looking to the termination of the strike, Mr. Gamble, one of the Union representatives, "referred to his knowledge that the Company had hired 'a lot of people' during the strike and inquired the Company's position as to taking back the other strikers 'as soon as you can find places for them.' Bartlett [the Company president] replied that most of the jobs had been filled, but that it was 'naturally' the Company's position to take the strikers back as soon as it could, 'because those are the people that know this job,' and that there would be no discrimination against them because of their participation in the strike. The conference ended with the announcement by Gamble that the strike was officially terminated and

by [Company counsel] Mueller's congratulations to Gamble upon the peaceful conduct of the strike."

3. "The evidence does not show that express reference was made to the question whether individual applications were necessary. However, it was apparently understood that they were—presumably to indicate availability for employment—because Gamble, in announcing at the Union's strike headquarters the results of the conference, advised the strikers 'to immediately make applications for employment through Mr. Coley [the Company's personnel director],' and because he subsequently continued to advise other strikers to make their applications. . . . Actually, many of the strikers had begun to make application upon the removal of the picket line at 11 a.m. They, and those who joined them later, formed a line, were admitted singly to Coley's office, and were there interviewed individually."

4. "The evidence is not in conflict as to the tenor of the interviews. Upon the striker's statement of his desire to return to work, Coley's response was to the effect that all jobs had been filled, that there were no openings, and that he would call the applicant when a vacancy arose. Coley told none of the applicants that it was either proper or necessary for them to renew their application periodically. To the contrary, he told some of the applicants, who specifically inquired, that new applications were unnecessary, that he had their names and their telephone numbers on the list and would call them when anything became available."

5. "On two occasions subsequent to the end of the strike, the Union called Respondent's attention to its failure to reinstate many of the strikers and sought to negotiate with Respondent on the matter. Thus, on April 24, Gamble called Barlett to request a meeting to negotiate a contract, and complained also that a

number of strikers hah not been put back to work. Referring to production troubles in the plant, Gamble suggested that the sensible thing to do was to work out an agreement under which all the strikers would be taken back. Bartlett called back shortly and stated in effect that the Company was happy with things as they were and would let them remain.

"Rufus K. Ritchie, another International Representative of the Union, called Bartlett on August 6, and pointed out that a number of the strikers had not been reemployed, especially union officers and committeemen. Bartlett replied that he did not know that such was the case. Ritchie requested a meeting 'to see if something could be worked out.' Bartlett stated he would be away for a few days but would call Ritchie on his return. Around August 13 or 14, Bartlett called, stated that he had talked with Mueller, that the Company's position was that the Union no longer represented a majority of the employees, and he did not feel that anything could be gained by a meeting. Ritchie stated that the Company's position would force the Union to file a charge, and Bartlett replied that the Company would stand on its decision."

6. ". . . Written applications were taken from all new applicants, and when once an employee was hired, his application was kept on file permanently.

"If no jobs were open at the time applications were filed, Coley's practice was to inform the applicants that he would call them if vacancies arose, and he would then file the applications with other current ones in his desk to be referred to as employees were needed to fill vacancies. However, Coley considered applications to be current only for a period of from two weeks to a month, and he periodically cleared out his current file by removing from it applications which were more than a month old and by placing them in an inactive transfer file. In turn, Coley cleared out the inactive

files every six months by destroying old applications in order to conserve space. Coley also testified that in cases where an applicant replied, his application was replaced in the current file for a new period of currency.

"Coley's explanation of his limitation on the currency of applications was that he had learned from experience that job seekers in Sapulpa were generally not available after a week or two, having either moved on or having accepted other employment, and that he had found it a waste of time to attempt to contact applicants even a week after their application. He admitted that although his practice was to inform applicants that he would call them if vacancies arose, what that amounted to, *though not disclosed to the applicants,* was that he would call them if vacancies arose within the next two weeks.

"Coley testified that he had adhered to the foregoing practice for some 8 or 10 years, and that he did not handle the strikers' applications any differently than he did those of new applicants. Since the strikers were former employees, Coley had their original written applications on file and he required no new applications of them. What he did was simply to list them as available for work, but as in the case of new applicants, he considered their applications to be current for only about two weeks. Thus, Coley testified that he did not refer to the list when vacancies arose more than 30 days after the applications listed thereon; that although he kept the list in his transfer files, he did not, for example, refer to it when vacancies arose as late as October 26, 1951 . . ." [Emphasis supplied.]

III. As to additional matters evidencing discrimination, the Trial Examiner found:

1. "Practically all of the strikers included in the complaint had walked the picket line either the morning of, or the day before, the end of the strike. Of a

total of 10 union officers and committeemen, Respondent employed only one officer, Mary Easley (financial secretary), and one committeeman, Andrew Meyers. The circumstances surrounding both are significant.

"Meyers had applied for and was granted reinstatement prior to the end of the strike. His case is to be contrasted with Lola Wilson, who also applied to Coley prior to the removal of the picket line on March 29, and who was told to come back to work. Learning that the picket line was shortly to be removed, Wilson waited until it was taken off, then lined up with the other strikers and was interviewed by Coley, who listed her name with the others and stated that he would call her in [sic] anything became available.

"Easley had moved from Sapulpa following the strike, but in September 1951, Coley made a special trip to her home, some 20 miles from Sapulpa, and offered her employment. Easley was unable to accept at that time but was later hired in February 1952, after notifying Coley that she was available for employment. Easley also testified, without denial from Coley, that shortly before the hearing, Coley had discussed with her the impending hearing in this case, stating among other things that a lot depended on the testimony to be given, that he was glad to have her back in the Company's employ, but that he would not 'walk across the street for some of them,' and that that was why he had come to look her up (for employment)."

2. The Company "ceased to reemploy strikers in any substantial number around April 19 [the strike ended March 29], which coincided roughly with [the Company's] refusal to negotiate with the Union as the representative of the employees."

The Board did not disturb the foregoing findings that (1) jobs were available; (2) the strikers in question had applied for such jobs; and (3) their "applications were understood to be continuing ones" and not "*for only a*

short and indefinite period." Thus the sole reason which the Company offered for not employing these strikers is plainly refuted by the record. Nevertheless the Board reversed the Trial Examiner's determination "that by failing to employ the [strikers here, the Company] discriminated against them for the purpose of discouraging membership in the Union and thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act." The Board said, in effect, that a determination of discrimination was precluded by (1) the Company's non-discriminatory treatment of the vast majority of the strikers; and (2) the Company's background which was free of unfair labor practices.

In light of the record as a whole, including the Trial Examiner's findings, it seems to me that the matters relied upon by the Board may fairly be said to be frivolous. It is at least clear that, under any reasonable view of the Supreme Court's decisions in *Federal Communications Comm'n* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); and *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), such matters are plainly insufficient to support the Board's action.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956.

No. 12,620

AMERICAN FLINT GLASS WORKERS' UNION OF NORTH AMERICA, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

BARTLETT-COLLINS COMPANY, *Intervenor.*

United States Court of Appeals for the District of Columbia Circuit FILED JAN 30 1956 Joseph W. Stewart, Clerk

On Petition to Review Order of the National Labor Relations Board.

Before: Bazelon, Danaher and Bastian, Circuit Judges.

Judgment

This case came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the National Labor Relations Board on review in this case be, and the same is hereby, affirmed.

Dated: January 30, 1956

Per Circuit JUDGE BASTIAN.

Separate dissenting opinion by Circuit Judge Bazelon.

Certificate of Service

I hereby certify that I have today served the foregoing petition of the American Flint Glass Workers Union of North America, et al., upon each of the adverse parties and upon the Solicitor General of the United States pursuant to the requirements of Rule 33 by depositing a copy of the same in envelopes in a United States Post Office, with first class postage prepaid, addressed to the Solicitor General and to each of the following counsel of record for such parties:

Solicitor General of
the United States
Department of Justice
Washington 25, D. C.

Mr. Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.
Counsel for Respondent

Mr. Jesse R. Smith
1627 K Street, N. W.
Washington 6, D. C.
Counsel for Bartlett-Collins Company,
Intervenor below.

Edward J. Hickey, Jr.
620 Tower Building
Washington 5, D. C.
Counsel for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 906

AMERICAN FLINT GLASS WORKERS' UNION OF NORTH AMERICA, ET AL., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 14a-27a) is reported at 230 F. 2d 212. The Board's decision and order (R. 411a-416a, 319a-348a) is reported at 110 NLRB 395.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1956 (Pet. 28a). The petition for a writ of certiorari was filed on April 28, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the record considered as a whole supports the Board's finding, contrary to that of the Trial Examiner, that the General Counsel had failed to sustain the burden of proof that the employer was motivated by discriminatory considerations in failing to reemploy certain strikers.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth in Appendix A of the Petition (Pet. App. 1a-7a).

STATEMENT

I. The Board's Findings and Conclusions Resulting in Its Dismissal of the Complaint

The Board found that the General Counsel had failed to sustain the burden of proving, as alleged in the complaint, that Bartlett-Collins Company of Sapulpa, Oklahoma (herein called the Company), was discriminatorily motivated in failing to rehire 25 of its former employees who had participated in an economic strike called by American Flint Glass Workers' Union of North America (herein called the Union) and had been replaced during the strike. The Board accordingly dismissed the complaint. The evidentiary facts relied on by the Board may be summarized as follows:

Prior to the events here in issue, the Company had recognized and bargained with the Union for over 10 years in a unit composed of its miscellaneous production and maintenance employees as well as in a separate unit composed of its moldmakers and other skilled employees (R. 322a; 236a-239a). Insofar as the record shows, no unfair labor practices occurred during that period (R. 336a, 338a, 414a).

As the result of a breakdown in negotiations over a new contract, the Union, on March 14, 1951, called a strike in support of its demands (R. 323a; 155a-156a). About 170 of the approximately 460 employees in the unit participated, along with 11 moldmakers (R. 323a; 32a, 59a, 231a-232a, 295a, 297a-319a). On March 28 the Company withdrew recognition from the Union, on the ground that its majority status was in doubt, and on March 29 the strike was called off (R. 328a, n. 14, 414a, n. 7; 62a-63a, 239a). By the end of the strike, all strikers except those who had returned to work during the strike and the 11 moldmakers had been replaced (R. 323a; 158a, 199a, 269a-271a).

At a conference between representatives of the Union and of the Company on March 29, the Company's vice president, Bartlett, agreed to reinstate the moldmakers, whose jobs had not been filled (R. 324a-325a; 158a). With respect to the other strikers, he assured the Union, "Naturally, we are going to put on these people when we can. We'll do the best we can" (R. 412a; 31a).

Following this conference, and pursuant to instructions from their union representatives, strikers desiring to return to work began making individual applications for reemployment (R. 412a; 40a, 160a). About 100 strikers applied, all but a few within a two and a half week period (R. 412a; 40a, 59a, 265a-268a). Of these 100, 73 were reemployed despite the fact that the Company had completely restaffed its plant during the strike (R. 413a; 315a-316a). Sixty were reemployed within the first three weeks after the strike ended (R. 413a, n. 2; 315a-316a). As a result, the Company was overstaffed during April, employing 511 persons as compared with 461 before the strike (R. 413a, n. 2; 208a).

Employment turnover at the plant was substantial, however, and during the two year period following the end of the strike, the Company hired a total of 510 new employees without reemploying the 25 former strikers here in issue who filed applications at some time after the termination of the strike (R. 329a; 61a, 63a, 192a, 269a-294a, 296a). Many of the 25 had walked the picket line during the last two days of the strike, but so, too, had a substantial number of the strikers who were subsequently reemployed (R. 414a; 71a-72a, 83a-84a, 94a-96a, 216a-217a). Among these 25 were four[1] of the ten union officers and committeemen

[1] Petitioner erroneously states that five of these 25 applicants were union officers or committeemen (Pet. 4).

(R. 413a; 12a, 76a, 250a). Of these four, three either specifically asked to be returned to their old jobs, which were filled at the time (R. 414a; 84a, 149a), or unlike the great majority of the strikers, did not apply until five or more weeks after the strike ended (R. 414a, n. 5; 115a, 149a).[2]

In explanation of its failure to rehire these 25 former strikers, the Company offered the testimony of its personnel manager, Coley, who was personally and solely in charge of the hiring of personnel (R. 332a; 35a, 39a-40a). According to his uncontradicted testimony, when the Company needed employees, it usually needed them at once (R. 332a; 191a, 192a-193a). His experience had shown that applicants for employment in Sapulpa were generally not available after a week or two, as they had by that time ordinarily accepted other employment (R. 332a; 42a-43a, 195a-196a). He therefore did not ordinarily make any attempt to get in touch with an applicant after his request for employment was more than four weeks old, even though he usually told all applicants, as he did the 25 former strikers, that he would call them if vacancies arose (R. 333a; 43a, 45a, 196a-197a). He had adhered to the foregoing practice for some eight or ten years (R. 333a; 196a-197a). He

[2] With respect to the six remaining union officers or committeemen, one did not go on strike, two returned to work after the termination of the strike, and the remaining three abandoned any claim to reemployment (R. 413a, n. 4; 72a, 86a, 254a, 308a).

did not handle the strikers' applications any differently than he did those of new applicants (R. 33a, 338a; 41a, 45a, 55a, 197a, 201a-202a). Since the strikers' applications were already on file, he did not require them to fill out new ones but simply listed the strikers as available for work when they applied, and considered their applications, like others, current only for a period of from two weeks to a month (R. 332a, 333a, 55a, 58a, 190a, 197a, 201a-202a). Coley testified that the Company had failed to hire the 25 former strikers for the sole reason that there were no job openings for them at any time when their applications were current (R. 333a; 200a, 204a).

Upon the basis of the foregoing facts and the entire record, the Board concluded that the record did not establish by a preponderance of the evidence any discriminatory motivation by the Company in failing to rehire the 25 former strikers (R. 415a). The Trial Examiner, reaching a different conclusion, had found, among other things, that the Company's assurance to the union representatives upon the termination of the strike that the Company would put the strikers back to work when it could constituted an agreement to rehire them, and that, because of this agreement, the Company was not warranted in following "its normal hiring practices without discrimination as between strikers and new applicants" (R. 338a-339a). In his view, "by agreement and by law

[the Company's] obligation to reemploy the strikers differed significantly from any it owed to new applicants" and the Company "had waived whatever rights it had to consider the strikers only as new employees." (R. 339a).

The Board disagreed with the Trial Examiner's legal conclusion in this respect, pointing out that, even assuming that the Company's assurances constituted an agreement to rehire the strikers when it could, the failure to comply was not "discriminatory as a matter of law," for permanently replaced economic strikers, such as the 25 here in issue, "merely have the right not to be penalized for their concerted activity, and are not entitled to preferential status in hiring" (R. 414a-415a). It held that these former strikers "are in the position of applicants for new employment as to whom the General Counsel must sustain his burden of proving discriminatory motivation on the part of" the Company (R. 415a). In view of all the facts outlined above, including the fact "that the Company had a background free of unfair labor practices, that the great majority of the strikers who applied for reemployment were rehired, and that there [was] no showing that any of the rehired strikers, who were also union members and had participated in picketing, was discriminatorily treated upon return to work," the Board found that the General Counsel had failed to sustain his burden of proving discriminatory motivation by

a preponderance of the evidence (R. 415a). It accordingly dismissed the complaint (R. 415a, 416a).

II. The Opinion of the Court of Appeals

The court below, with one judge dissenting, sustained the Board's dismissal of the complaint. It stated that the Board had "obviously believed" the uncontradicted testimony of Personnel Manager Coley as to why the 25 strikers had not been rehired, as the Board had a right to do (Pet. 18a). The court noted that the Board, in dismissing the complaint, had relied upon Coley's testimony that he had not handled the applications of the 25 any differently from those of new applicants, and that no positions were available when the requests by these 25 for employment were in an active status (Pet. 18a); that the Board had also relied on the fact that within a few weeks after the termination of the strike, the Company had reemployed most of the strikers, even overstaffing its plant to do so; that among those reemployed were many who, like those not reemployed, had walked the picket line until the end of the strike; that none of those rehired were shown to have been discriminatorily treated after their return to work; and that the Company had a background free of unfair labor practices (Pet. 16a, 17a-18a).

With respect to the Board's rejection of the Trial Examiner's conclusions, the Court of Appeals, citing this Court's opinion in *Federal Com-*

munications Commission v. *Allentown Broadcasting Co.*, 349 U.S. 358, 363-364, held that the Board's action was a proper exercise of its statutory responsibility (Pet. 19a-20a).

ARGUMENT

The crux of petitioners' case is (Pet. 2, 10-13) that since, as they assert, the trial examiner rejected as incredible the Company's explanation for failing to rehire the strikers in question and concluded that the Company had discriminated against them, the Board could not validly reverse the examiner without finding and accepting as credible the Company's explanation for its action. The Board, petitioners' argument runs, did not so find, and, accordingly, upon the basis of the undisputed evidence, it could have reached no other conclusion than that the Company had discriminated against the strikers. This contention mistakenly presupposes that the trial examiner found the Company's explanation, as given by Personnel Manager Coley, incredible, and that his decision turned upon that finding. The trial examiner noted the Company's explanation that it had followed its normal hiring practice as between the strikers and new applicants for employment (R. 338a-339a). He accepted that testimony at face value, but deemed it of no significance because, as he saw the case, "the issue under the evidence is whether, in view of [the Company's] promise to reemploy the strikers as vacancies arose, [the

Company] acted discriminatorily in failing to do so" (R. 335a). He concluded that the decisive factor which governed the case was that "by agreement and by law [the Company's] obligation to reemploy the strikers differed significantly from any it owed to new applicants", and hence "it [was] no defense that Coley's handling of the strikers' applications did not differ from the treatment he accorded to new applications * * *" (R. 339a, 341a).

The Board accepted the facts as found by the examiner, but disagreed with his legal conclusion that in the circumstances the strikers were entitled to preferential status (Pet. App. B 11a).[3] Having rejected that conclusion, the Board then found that, on the undisputed facts as ascertained by the trial examiner, the General Counsel had failed to establish by a preponderance of the evidence that the Company's treatment of the strikers in question was prompted by a discriminatory purpose (Pet. App. B 10a-12a).

This case is not, therefore, as petitioners suggest (Pet. 12), one where the Board has improperly discounted "the trial examiner's judgment with respect to the credibility of the Company's principal witness * * *." The disagreement was due in substantial part to the Board's rejection of the trial examiner's legal conclusions. And it

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[3] The correctness of the Board's statement of the law in this respect is not here in dispute.

was unquestionably within the province of the Board's "responsibility for decision" to assess the weight of the undisputed facts in determining whether the General Counsel had met the burden of proof which the statute prescribes. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492.

Thus, petitioners misconceive the problem in the case when they contend (Pet. 13) that the Court of Appeals erred in assuming that the Board believed the uncontradicted testimony of the Company's personnal manager with respect to the Company's hiring practice, since, petitioners say, the trial examiner had discredited it and the Board did not disturb that resolution. As already noted, the examiner did not discredit Coley's testimony but, rather, found that on his analysis of the case it did not constitute a defense to the charge of discrimination. The Board took note of the Company's hiring practice as explained by the uncontradicted testimony of the latter's personnel manager (Pet. App. B 9a, n. 1). And, weighing the record as a whole, it concluded that on balance the General Counsel had not met the burden of showing discriminatory motivation by a preponderance of the evidence. The Court of Appeals' affirmance of this factual determination presents no question requiring review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

FANNIE M. BOYLS,
Attorney,
National Labor Relations Board.

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